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In the Supreme Court
of the
United States

October Term, 1948

No. 403

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. DAVID ZELLERBACH and
HAROLD L. ZELLERBACH, Executors,
Petitioner,

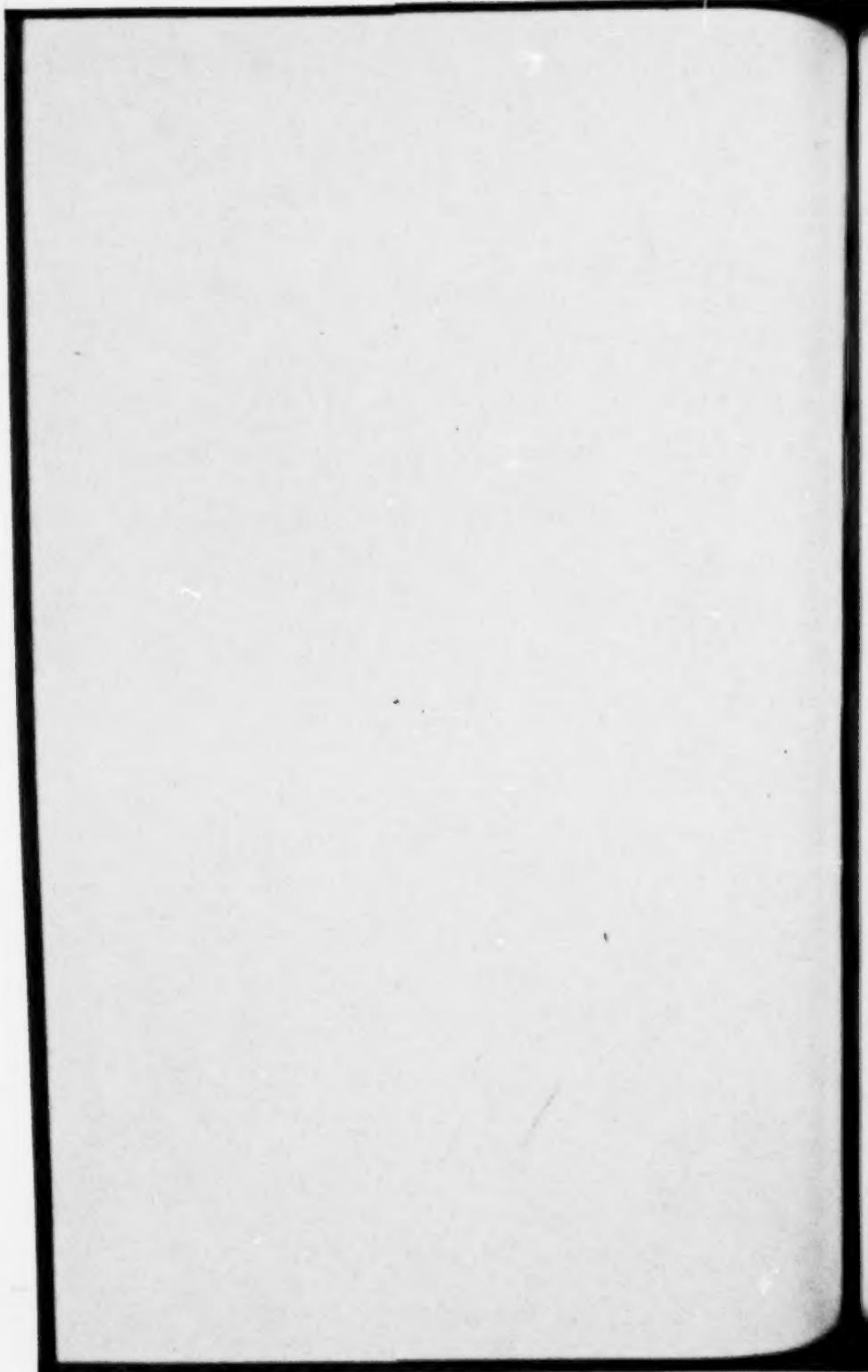
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

ESTATE OF ISADORE ZELLERBACH, Deceased, J. DAVID ZELLERBACH and HAROLD L. ZELLERBACH, Executors,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The Estate of Isadore Zellerbach, Deceased, by J. David Zellerbach and Harold L. Zellerbach, the executors thereof, hereinafter called the petitioner, peti-

tions this Honorable Court for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit rendered on August 12, 1948, which decision is reported in 169 Federal Reporter 2nd Series, 275, and is set forth in Appendix "A", attached hereto. The said decision affirmed an opinion of the Tax Court of the United States, reported in 9 T. C. 89 (Transcript of Record 136-165), and also set forth in the Appendix "B", attached hereto.

The case was brought to the Circuit Court of Appeals for the Ninth Circuit under the provisions of Section 1141 of the Internal Revenue Code.

OPINION BELOW.

The petitioner filed a petition for a review by the Circuit Court of Appeals for the Ninth Circuit of a decision in the United States Tax Court, which was filed with the Clerk of the Tax Court on October 14, 1947, and which petition is set forth in the Transcript of Record at pages 166-175. The decision of the Tax Court assessed deficiency against the petitioner for income taxes for the years 1942 and 1943. The Circuit Court of Appeals, in affirming the decision of the Tax Court, did not write a separate opinion but stated, "On the ground and for the reasons stated in its opinion the decision of the Tax Court is affirmed. (9 T. C. 12, Docket No. 9786, Promulgated July 22, 1947.)"

The opinion of the Tax Court is recorded in 9 Tax Court 89 and is likewise set forth at length on pages 136 to 165 in the Transcript of Record and in Appendix "B" attached hereto. This petition, therefore, makes reference to the Tax Court opinion rather than to the opinion of the United States Circuit Court of Appeals for the Ninth Circuit. The opinion of the Circuit Court of Appeals which is reported in 169 Federal (2d) 275, is attached hereto as Appendix "A".

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on August 12, 1948. The petitioner filed its petition for review by the United States Circuit Court of Appeals upon the jurisdiction conferred upon the Circuit Court of Appeals under the provisions of Section 1141(a) of the Internal Revenue Code and Section 1141(b)(1) of the Internal Revenue Code.

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U. S. C. 1254(1), Section 1141(a) of the Internal Revenue Code, Supreme Court Rule 38, paragraph 5(b).

STATUTES.

The statutes involved are the provisions of Section 162 of the Internal Revenue Code and in particular subdivisions (b), (c) and (d)(1), and Sections 300,

956, 1000 and 1001 of the California Probate Code. The pertinent provisions of these sections are set forth in Appendix "C" attached hereto. There is also involved certain provisions of Treasury Regulations 111 promulgated under the Internal Revenue Code which are likewise set forth in Appendix "C".

**STATEMENT OF FACTS AND MATTERS INVOLVED
IN THIS PETITION.**

The facts are simple and are not in dispute, the case having been submitted to the Tax Court for decision upon a stipulation of facts, which stipulation of facts are stated in the Findings of Facts of the Tax Court. (Tr. pp. 137-145.)

The question in dispute is as to whether the petitioner (the estate of the decedent) is entitled under the provisions of Section 162 of the Internal Revenue Code for each of the taxable years covered by the litigation (1942 and 1943) to a deduction in computing of any income of the estate, for the income which is distributed to the heirs and legatees, or, the income, which in the discretion of the executors, could either have been distributed or accumulated.

The controversy revolves around the interpretation of the provisions of Section 162(b), (c) and (d) of the Internal Revenue Code, the respondent's income tax regulations applicable to said section, and in particular certain provisions of the California Probate Code, the interpretation of which directly affects the litigation.

The following is a brief summary of the stipulation of facts, as well as the Findings of Fact of the Tax Court:

Isadore Zellerbach died testate on August 7, 1941, in the County of San Mateo, State of California, being at the time of his death a resident of the City and County of San Francisco, State of California; on the 2nd day of September, 1941, his will was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, in those certain probate proceedings entitled, "In the Matter of the Estate of Isadore Zellerbach, Deceased, No. 87,721," and J. David Zellerbach, Harold L. Zellerbach and Marcus M. Baruh, who were named therein as such were appointed Executors, and Letters Testamentary were issued to them. Marcus M. Baruh died on the 6th day of April, 1942, and ever since said date J. David Zellerbach and Harold L. Zellerbach have been, and now are, the duly appointed, qualified and acting Executors of the Last Will and Testament of Isadore Zellerbach, deceased. A copy of said last will and testament of Isadore Zellerbach is attached to the stipulation of facts and marked Exhibit "A". (Tr. pp. 30-35.)

Under the decedent's last will and testament, there are certain specific legacies provided for after which the residue of the estate is directed to be distributed one-half to decedent's widow, Jennie B. Zellerbach and one-sixth to each of the decedent's three children, to wit, J. David Zellerbach, Harold L. Zellerbach and

Claire Z. Saroni. (Exhibit "A", Stipulation of Facts, Tr. p. 34.)

On August 19, 1942, the executors of decedent's will filed with the Probate Court a petition praying for leave to distribute the specific legacies, which petition was granted on September 2, 1942. (Exhibits "E" and "F", Stipulation of Facts, Tr. pp. 55 to 66.)

On November 25, 1942, the executors filed with the Probate Court two petitions for partial distribution. In one the executors alleged that the income of the estate (petitioner herein) for the calendar year 1942 would approximate the sum of \$317,000.00 and prayed for an order of the Probate Court authorizing them to distribute from the income of the estate the sum of \$181,000.00 as follows: (a) to Jennie B. Zellerbach, the widow of the decedent, \$22,000.00; (b) to J. David Zellerbach, the son of the decedent, \$53,000.00; (c) to Harold L. Zellerbach, the son of the decedent, \$53,000.00; (d) to Claire Z. Saroni, the daughter of decedent, \$53,000.00. (Exhibit "G", Stipulation of Facts, Tr. pp. 62 to 65.)

This petition was heard on December 7, 1942, by the Probate Court, and was granted. (Exhibit "H", Stipulation of Facts, Tr. pp. 66 to 68.)

The other petition for partial distribution, which was filed on November 25, 1942, after alleging that all the gifts and legacies under the decedent's will were distributed on September 2, 1942, and paid, prayed for permission to distribute certain assets of the estate to the residuary legatees and devisees in

the proportions that they took under the will, namely, one-half to the widow, and one-sixth to each of the children. (Exhibit "I", Stipulation of Facts, Tr. pp. 68 to 72.) This petition was heard by the Probate Court and granted on December 8, 1942, and the property described in the petition was ordered distributed in the proportions hereinabove set forth. (Exhibit "J", Stipulation of Facts, Tr. pp. 72 to 74.) The property so distributed on December 8, 1942, had a fair market value on that date of \$1,146,000.00. (Paragraph 25, Stipulation of Facts, Tr. p. 28.)

The income of the estate for the calendar year 1942 before any allowances for income distributed to the beneficiaries under decedent's will (the residuary legatees and devisees) was \$324,209.38, which said sum was composed of ordinary income in the amount of \$316,595.74, and capital gains in the amount of \$7,613.64. (Paragraph 19, Stipulation of Facts, Tr. pp. 27 to 28.)

On December 31, 1942, the estate (petitioner herein) had assets of \$3,425,092.17 and liabilities of \$1,419,565.49, or an excess of assets over liabilities of \$1,934,526.68. This was after the distribution of \$181,000.00 in income and \$1,146,000.00 in corpus, and after giving effect to all liabilities which were subsequently determined to be due. (Exhibit "S", Stipulation of Facts, Tr. pp. 99 to 103.)

The estate (petitioner herein) filed income tax returns on a cash basis for the calendar year 1942 with the Collector of Internal Revenue at San Francisco,

California, and claimed as a credit the amount distributed to the beneficiaries by the decree of partial distribution made by the Probate Court on December 7, 1942, and subsequently filed an amended return and claimed credit for the full amount of the income of the estate for the calendar year 1942, to wit, the sum of \$324,209.58. (Paragraph 2 and Exhibit "C", Stipulation of Facts, Tr. pp. 24 to 25 and 37 to 48.)

The beneficiaries under the will reported in their respective income tax returns the full amount of the estate's (petitioner herein) income for the year 1942; the widow, Jennie B. Zellerbach, having originally reported only the amount of cash actually distributed to her, and subsequently having filed an amended return wherein she included as income distributed to her from the estate of the decedent, one-half of the income of the estate for the year 1942, to wit, the sum of \$157,661.87. (Paragraph 28, Stipulation of Facts, Tr. p. 29.)

On November 30, 1943, the executors filed a petition with the Probate Court for partial distribution, asking permission to distribute from the income of the estate for the year 1943 the sum of \$96,000.00, which sum was to be distributed one-third to each of the children of the decedent, and no portion of the income was asked to be distributed to the widow, Jennie B. Zellerbach. The petition alleged that the income for the year 1943 would approximate the sum of \$191,000.00. (Exhibit "Q", Stipulation of Facts, Tr. pp. 93 to 97.)

On December 13, 1943, the Probate Court made an order for partial distribution, authorizing the distribution of the amount of \$96,000.00 as prayed for (Exhibit "R", Stipulation of Facts, Tr. pp. 97 to 99.)

Jennie B. Zellerbach, the widow, reported in her income tax return for the year 1943 the fact that there had been distributed to her from the estate of decedent for the year 1943 the sum of \$92,664.15. (Paragraph 29, Stipulation of Facts, Tr. p. 29.)

The total net income of the estate for the year 1943, before allowance for income distributed to beneficiaries during said year was the sum of \$206,864.94, which sum was composed of ordinary income in the amount of \$188,328.30 and capital gains in the amount of \$18,536.64. (Paragraph 20, Stipulation of Facts, Tr. p. 28.)

The estate filed its income tax return for the year 1943 on a cash basis with the Collector of Internal Revenue at San Francisco, California, and claimed as credit for income distributed to the beneficiaries (the residuary devisees and legatees under the will), the sum of \$185,528.30. (Exhibit "D", Stipulation of Facts, Tr. pp. 49 to 54.)

On December 31, 1943, the assets of the estate had a value of \$3,942,739.89, and the liabilities amounted to the sum of \$1,104,886.70, and the amount of the excess of assets over the liabilities was the sum of \$2,837,855.19. (Exhibit "T", Stipulation of Facts, Tr. pp. 103 to 106.)

The estate, other than the amounts which it owed for taxes, had only two creditors on December 31, 1942, one of whom was the widow, Jennie B. Zellerbach, and the other the Wells Fargo Bank & Union Trust Co.; the Wells Fargo Bank & Union Trust Co. would have consented to a distribution of the estate had such a request been made of it.

It is the petitioner's contention that by reason of the foregoing facts that the petitioner was entitled to a deduction as against its 1942 and 1943 income, not only for the income which it actually distributed to the children of the decedent in each of said taxable years, but also for the income which the widow of decedent was entitled to receive and which income the petitioner contends that the widow as one of the residuary devisees and legatees under the will had a present right to receive in each of said years by reason of the California Probate Code.

It is the petitioner's further contention that the Tax Court interpretation of the California Probate Law applicable to the question presented by this appeal was in direct conflict with the decisions of the California Appellate Courts, applicable thereto, which error was the basis of its opinion and decision in this case and which error was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

QUESTIONS PRESENTED.

1. *Did not the Tax Court (and the Circuit Court of Appeals for the Ninth Circuit) misinterpret the provisions of the California Probate Code in holding that the residuary devisees and legatees under the decedent's will did not have a present right to the income of the decedent's estate for the years 1942 and 1943, as well as a right under the California law to compel the distribution of said income?*

The Tax Court (and the Circuit Court of Appeals for the Ninth Circuit by its adoption of the opinion of the Tax Court), entirely misconstrued certain applicable provisions of the California Probate Code and the decisions of the California Appellate Courts interpreting those applicable code sections in holding that the residuary legatees and devisees under the decedent's will did not have a present right to the income of the estate of said decedent for both the years 1942 and 1943, as well as the right, under the California law, to compel a distribution of said income, which error of the Tax Court and the Circuit Court deprived petitioner of the benefits of Section 162(b) and (c) of the Internal Revenue Code. Had the Tax Court correctly interpreted the California Probate Law in this respect the petitioner would have been entitled to a deduction of all the income of the estate for each of the years 1942 and 1943 under the provisions of the Internal Revenue Code.

2. *Did not the Tax Court (and the Circuit Court of Appeals for the Ninth Circuit) misconstrue the provisions of Section 162(d)(1) of the Internal Reve-*

nue Code in failing to allow petitioner as a credit against its income for the years 1942 and 1943 the amount of its distribution of corpus of the estate to the extent that such distribution of corpus equalled the distributable income of the estate in each of said years?

In each of the years 1942 and 1943 the petitioner distributed to the residuary devisees and legatees certain portions of the corpus of the estate, the amount of which distributions of corpus exceeded the amount of the distribution of income and the amount of the distributable income which the petitioner had for each of said years. It is the petitioner's contention that the Tax Court (and the Circuit Court of Appeals for the Ninth Circuit), in failing and refusing to allow the petitioner the amount of the claimed deduction for such distribution of corpus to the extent that it equalled the distributable income of the estate as well as the amount of income actually distributed, entirely misconstrued the provisions of Section 162 (d)(1) of the Internal Revenue Code, and had it properly interpreted the provisions of said section the petitioner would have been entitled to a deduction as against its income for each of said years in the amount of such excess distributions of said corpus.

3. *Did not the Tax Court (and the Circuit Court of Appeals for the Ninth Circuit) err in failing to allow the petitioner as a deduction from the petitioner's gross income for the year 1942 the full amount of petitioner's income for the year 1942?*

4. Did not the Tax Court (and the Circuit Court of Appeals for the Ninth Circuit) err in failing to allow the petitioner as a deduction from the petitioner's gross income for the year 1943 the full amount of petitioner's income for the year 1943?

REASONS FOR GRANTING THE WRIT.

1. THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT'S DECISION (AFFIRMING AND ADOPTING THE DECISION OF THE TAX COURT OF THE UNITED STATES), HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS HONORABLE COURT.

The Circuit Court of Appeals for the Ninth Circuit in adopting and affirming the decision of the Tax Court in the instant matter has decided two very important questions relating to the interpretation of the Internal Revenue Laws, which questions have not been decided, but should be decided by this Honorable Court, and which questions affect the administration of the Internal Revenue Laws. As a matter of fact, said questions have not been decided by any other Circuit Court of Appeals, although there are similar decisions by the Tax Court.

(a) There has never been a determination by this Honorable Court as to whether an estate of a decedent, in order to obtain a deduction against its income under the provisions of Section 162 (b) and (c) of the Internal Revenue Code, must actually obtain a decree of the Probate Court distributing income where the devisees and legatees have a right to compel a distribution of income under the applicable local law, or where it can be shown that the devisees and legatees have a present right to the income of the estate.

The first question is whether under the provisions of Section 162(b) and (c) it is necessary to obtain a decree of the Probate Court actually distributing the income to the beneficiaries, devisees and legatees in order to obtain the credit allowed under those sections, if it can be shown that said beneficiaries, devisees or legatees had either a present right to such income or a right under a local law to compel a distribution of said income. Since the provisions of the sections of the Internal Revenue Code which we have referred to, as well as the respondent's regulations which we have set forth in Appendix "C" and which relate to the particular provisions of the Internal Revenue Code involved in this appeal, indicate in unmistakable language that it is neither necessary to obtain an order of the Probate Court for the distribution of income or to pay the income of the estate to the beneficiaries, devisees or legatees, in order to be entitled to the credit therefor if the beneficiaries, devisees and legatees are entitled either to the income or to have the right to compel the distribution of the income, we earnestly submit that the Tax Court and the Circuit Court of Appeals, in adopting the opinion of the Tax Court, erroneously decided

this important question of Federal Income Tax law. It is the petitioner's contention that the decision below in holding that it was necessary to obtain an order or decree of the Probate Court for the distribution of income or to actually make a distribution of income before an estate of a decedent (the petitioner herein), would be entitled to a deduction for such income as against income for the particular year involved, was clearly erroneous and contrary to the Internal Revenue Laws.

(b) There never has been a determination by this Honorable Court as to whether Section 162 (d)(1) of the Internal Revenue Code applies to all distributions of corpus by estates of trust during the course of administration or only to estates or trusts where there are bequests and devises which are to be paid at intervals.

The second question which we contend the Circuit Court of Appeals in affirming and adopting the decision of the Tax Court has erroneously decided, and which is an important question of Federal Law which has not been, but which should be settled by this Honorable Court, is whether the provisions of Section 162(d)(1) of the Internal Revenue Code applies to all distributions of corpus estates and trusts during the course of adjustment, generally, as the petitioner contends, or, merely applies in those cases where there is a bequest and devise which is to be paid, credited or distributed at intervals, as the Tax Court held. This question has never been decided by either this Honorable Court or by any Circuit Court of Appeals and presents a very important question in the administration of the Internal Revenue Laws. It

is the petitioner's contention that the amount of corpus distributed in each of the taxable years in which this estate had distributable income is deemed as a distribution of income in an amount that the value of the corpus distributed equals the distributable income under the provisions of said section 162(d)(1) of the Internal Revenue Code. The Tax Court held that said section only applied to a bequest or devise that is to be paid, credited or distributed at intervals. It is petitioner's contention that such was not the intention of Congress, nor the proper construction of this section, and which clearly appears from a reading of the section itself.

2. THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

We further earnestly submit that the Circuit Court of Appeals for the Ninth Circuit, in affirming and adopting the decision of the Tax Court, has misconstrued the effect of Sections 300, 956, 1000 and 1001 of the California Probate Code and the decisions of the California Appellate Courts interpreting the provisions of said sections and in particular the decisions in the following cases:

The Estate of Henry S. Stephenson, Deceased,
65 Cal. App. (2d) 120;
In re Crocker, 105 Cal. 368;
Estate of Chesney, 1 Cal. App. 30;
Estate of Hinkel, 176 Cal. 563.

It is the petitioner's contention that in view of the sections of the California Probate Code which we have referred to, as well as the decisions of the California Appellate Courts we have cited, that the correct interpretation of the California Probate Law should have been that the residuary legatees and devisees under decedent's will, namely, the decedent's widow, Jennie B. Zellerbach, to whom distribution of income had not been made, had a present right by reason of the decrees of partial distribution set forth in the transcript of the record, distributing income to the other residuary legatees and devisees under the decedent's will and the decrees of partial distribution distributing corpus to all of the residuary devisees and legatees under decedent's will, to compel the distribution to her of her share of the income of the estate of decedent for each of the years 1942 and 1943, and also had a present right to said income; that had the Tax Court and the Circuit Court of Appeals for the Ninth Circuit made such a finding based upon the aforesaid decisions of the California Supreme Court and District Court of Appeal and the Probate Code sections of the California Probate Code which we have cited, then under the provisions of Section 162(b) and (c) of the Internal Revenue Code and the Treasury Regulations which we have cited in Appendix "C" which relate to said Internal Revenue Code sections, the petitioner would have been entitled to a credit against its income for each of said years 1942 and 1943 for the full amount of all of its distributable income. It is the conflict between the decision of the

Circuit Court of Appeals for the Ninth Circuit (and the Tax Court), and the decisions of the California Appellate Courts which petitioner contends resulted in the erroneous affirmance by the Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court.

Wherefore petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the case on August 12, 1948.

Dated, San Francisco, California,

November 1, 1948.

PHILIP S. EHRLICH,

Attorney for Petitioner.

ALBERT A. AXELROD,

Of Counsel.

(Appendices A, B and C Follow.)

APPENDIX "A"

Decision of the United States Circuit Court of Appeals for the Ninth Circuit

(169 Fed. (2d) (3), 275)

Estate of Isadore Zellerbach, Deceased, J. David Zellerbach and Harold L. Zellerbach, Executors,
Petitioner,
vs.

No. 11,795
Aug. 12, 1948

Commissioner of Internal Revenue,
Respondent.

PETITIONS TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Before: Matthews, Stephens and Orr,
Circuit Judges, Per Curiam:

On the ground and for the reasons stated in its opinion the decision of the Tax Court is affirmed.
(T. C. 89.)

(Endorsed): Opinion. Filed August 12, 1948.

APPENDIX "B"

Tax Court of the United States
9 T. C. No. 12

Docket No. 9786

Estate of Isadore Zellerbach, Deceased, J. David Zellerbach and Harold L. Zellerbach, Executors, Petitioners,

vs.

Commissioner of Internal Revenue, Respondent.

PROMULGATED JULY 22, 1947.

FINDINGS OF FACT.

J. David Zellerbach and Harold L. Zellerbach are the duly appointed and acting executors of the last will and testament of Isadore Zellerbach, who died on August 7, 1941, a resident of the city and county of San Francisco, California. Income tax returns (Form 1041) for the years 1942 and 1943 were filed on the cash basis with the collector of internal revenue at San Francisco.

On September 2, 1941, the will of petitioners' decedent was admitted to probate by the Superior Court of California in and for the city and county of San

Francisco. Under the will, after bequests of \$5,000 to each of his eight grandchildren, all of the rest, residue and remainder of testator's estate is given, devised and bequeathed as follows: An undivided three-sixths thereof to the widow, Jennie B. Zellerbach, and an undivided one-sixth thereof to each of the three children, J. David, Harold L. and Claire. The executors were given full, absolute, and complete power and authority to sell, mortgage, pledge, exchange, or otherwise dispose of or deal with the whole or any portion of the estate according to their judgment and discretion and without any court order. The will made no provision for the distribution of the income received by the estate during the period of administration.

Upon petition of the executors of the estate praying for leave to distribute the specific legacies, an order of the probate court, dated September 2, 1942, was entered authorizing distribution of 61 shares of the preferred stock of Crown Zellerbach Corporation of a stated value of \$4,994.38 and the sum of \$5.62 in cash to each of the 8 grandchildren of decedent.

On November 25, 1942, the executors filed with the probate court a petition for the distribution of \$181,000 from the income of the estate received during the year 1942, amounting to approximately \$317,000, as follows:

To Jennie B. Zellerbach, widow.....	\$22,000
To J. David Zellerbach, son.....	53,000
To Harold L. Zellerbach, son.....	53,000
To Claire Z. Saroni, daughter.....	53,000
 Total.....	 \$181,000

The petition stated in part that the total value of the estate as shown by the inventory and appraisement was \$4,754,671.56, and that "it is not proposed at this time to distribute any of the corpus of the residue of the estate, nor any income, save and except that hereinabove described."

After hearing had, the probate court entered an order dated December 7, 1942, in which it found as follows:

* * * that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to the said distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;

* * * * *
The order authorized payment "from the income of said estate, for the calendar year 1942, the total sum of \$181,000," payable \$22,000 to the widow and \$53,000 to each of the three children of decedent.

The above distribution of \$181,000 was paid \$180,297.85 out of income and \$702.15 out of corpus.

On November 25, 1942, the executors filed another petition with the probate court, praying for authority to distribute from the corpus of the estate:

- 6,000 shares of preferred stock of Crown Zellerbach Corporation
- 30,000 shares of common stock of Crown Zellerbach Corporation
- 9,000 shares of preferred stock of Rayonier Inc.
- 12,000 shares of common stock of Rayonier Inc.

one-half thereof to the widow and one-sixth to each of the three children of decedent. After hearing had, the probate court entered an order dated December 8, 1942, authorizing the executors to make distribution of the above stock as prayed for. The fair market value of the above stock at the time of its distribution was \$1,146,000.

On December 31, 1942, all the distributions authorized by the probate court during the year 1942 had been made.

An original income tax return for the year 1942 was filed for the estate showing income of \$322,756.33, from which was deducted \$181,000 as the amount distributable to beneficiaries, leaving a net income (taxable to fiduciary) of \$141,756.33, and disclosing a tax liability of \$97,606.47. On December 14, 1943, an amended income tax return was filed for the year 1942 showing income of \$322,756.33, from which was deducted \$315,323.74 as the amount distributable to beneficiaries, leaving a net income (taxable to fiduciary) of \$7,432.59 and disclosing a tax liability of \$1,619.78.

The total net income of the estate for 1942, before any allowance for income distributed to beneficiaries during the year, was \$324,209.38, which sum was com-

posed of ordinary income in the amount of \$316,595.74 and capital gains in the amount of \$7,613.64.

The \$181,000 distributed in 1942 by the executors of the estate was reported by the beneficiaries under the will in their original Federal income tax returns for 1942 as distributable income from the estate as follows: The widow reported \$22,000 and each of the three children reported \$53,000.

On January 24, 1944, the widow filed an amended income tax return with the collector at San Francisco, in which she reported as having been distributed to her the amount of \$157,661.87, representing one-half of all of the income of the estate for the year 1942.

Pursuant to a petition of the executors filed June 18, 1943, the probate court, on July 7, 1943, made an order authorizing the executors to make a partial distribution of the assets of the estate, consisting of a parcel of unimproved real property in the city and county of San Francisco as follows: Three-sixths thereof to the widow and one-sixth thereof to each of the three children. The fair market value of the property at the time of distribution was \$27,500.

Pursuant to a petition of the executors filed August 4, 1943, the probate court on August 18, 1943, made an order authorizing the executors to make a partial distribution of the assets of the estate, consisting of 627 shares of the common stock and 460 shares of the preferred stock of Dreamland Auditorium, Ltd., as follows: Three-sixths thereof to the widow and one-sixth thereof to each of the three children. The fair

market value of the shares at the time of distribution was \$3,450.

On November 30, 1943, the executors filed a petition with the probate court for authorization to make a partial distribution, consisting of \$96,000, of which \$32,000 was to be distributed to each of the three children of decedent. In the petition it was stated that the income for 1943 would approximate \$191,500; that the executors desired to distribute \$96,000 thereof; and that it was not proposed to distribute any of the corpus of the residue of the estate, nor any income save and except that theretoabove described. No portion of the income was requested to be distributed to the widow. On December 13, 1943, the probate court made an order authorizing the income distribution of \$96,000, as prayed for. The distribution of \$96,000 was paid \$94,164.15 out of income and \$1,835.85 out of corpus.

On December 31, 1943, all distributions authorized by the probate court during 1943 had been made.

The income tax return filed for the estate for 1943 shows income tax income of \$203,895.74 and victory tax income of \$200,811.46, from each of which \$185,-328.30 was deducted as the amount distributable to beneficiaries, leaving an income tax net income of \$18,567.44 and a victory tax net income of \$15,483.16. The total income and victory tax liability shown by the return is \$6,712.28. The return contains a schedule as follows:

SCHEDULE A

	Federal	State
Jennie B. Zellerbach, 343 Sansome St., S. F.....\$	92,664.15	\$100,405.73
J. D. Zellerbach, 343 Sansome St., S. F.....	30,888.05	33,468.58
Harold Zellerbach, 343 Sansome St., S. F.....	30,888.05	33,468.58
Claire Z. Saroni, 343 Sansome St., S. F.....	30,888.05	33,468.57

\$185,328.30 \$200,811.46

Note: On December 13, 1943, a distribution of income, \$96,000.00 was authorized by court order to J. D. and Harold Zellerbach and Claire Saroni. The net income of the estate is deemed to be distributable under Section 162-2 of Regulations 111.

The widow included in her Federal income tax return for 1943, as income received by her from the estate, the sum of \$92,664.15.

The total net income of the estate for 1943, before any allowance for income distributed to beneficiaries during that year, was \$206,864.94, which sum was composed of ordinary income of \$188,328.30 and capital gain of \$18,536.64.

On petition filed October 26, 1942, the probate court, on November 6, 1942, made an order authorizing the executors to borrow a sum not to exceed \$1,000,000, to execute their promissory note or notes payable on or before one year after date with interest at 2½ per cent per annum, and as security therefor to pledge all or any portion of the personal property of the estate remaining in the hands of the executors.

Pursuant to such authorization the executors, on November 6, 1942, borrowed from Wells Fargo Bank & Trust Co. the sum of \$500,000, pledging as collateral 9,000 shares of the preferred stock of Crown Zellerbach Corporation of the market value at that time of approximately \$720,000. They also borrowed the sum of \$318,669.31 from the widow, Jennie B. Zellerbach. On January 15, 1943, a payment of \$100,

000 was made, reducing the principal of the bank loan to \$400,000. On August 5, 1943, and on December 6, 1943, additional amounts of \$50,000 and \$75,000 were borrowed, increasing the principal of the loan to \$525,000. The entire loan was paid on March 13, 1944.

The Federal estate tax, as disclosed by the return filed, had been paid at December 31, 1943. The Commissioner subsequently determined that the estate was liable for a deficiency in Federal estate taxes, which controversy was finally settled in November 1946.

On December 31, 1942, the estate had assets of the then value of \$3,425,092.17 and liabilities of \$1,490,565.49, or an excess of assets over liabilities of \$1,934,526.68. This was after the distribution of the amount of \$181,000 and the distribution of corpus of \$1,146,000, and after giving effect to all liabilities which were subsequently determined to be due.

On December 31, 1943, the assets of the estate had a value of \$3,942,739.89, and the liabilities amounted to \$1,104,886.70, or an excess of assets over liabilities of \$2,837,853.19.

OPINION.

VAN FOSSAN, Judge: The respondent contends that the executors under the will of Isadore Zellerbach were not required to distribute to the beneficiaries any of the income of the estate during 1942 and 1943 and that, therefore, only so much of the income as was actually distributed constituted a deduction under the provisions of section 162, Internal Revenue Code.

The petitioners contend that the estate is entitled, under section 162(b) and (c),¹ to a deduction of the full amount of its 1942 and 1943 income. They argue that the will provides for the distribution of three-sixths of the residue to the widow and one-sixth to each of the three children of decedent; that under the provisions of section 300 of the California Probate Code² the beneficiaries had a present right, both in

¹SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

²§ 300. Title to Decedent's Estate: Possession. When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or his administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this Code. [Enacted 1931.]

1942 and 1943, to the entire income of the estate; and that, upon petition, it would have been mandatory upon the probate court to have made an order for the payment of all of the 1942 and 1943 income to the beneficiaries. Secs. 956, 1000, and 1001, California Probate Code.³

³§ 956. Closing Administration. If all of the debts have been paid by the first order for payment, the court must direct the payment of legacies and the distribution of the estate among the persons entitled, as provided in the next chapter; but if there are debts remaining unpaid, or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for such time as may be reasonable. [Enacted 1931.]

§ 1000. Petition and Notice of Hearing. At any time after the lapse of four months from the issuance of letters testamentary or of administration, the executor or administrator, or any heir, devisee or legatee, *** may petition the court to distribute a legacy, devise or share of the estate, or any portion thereof, to any person entitled thereto, upon such person giving a bond as hereinafter provided. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. When the petitioner is not the executor or administrator, notice must be given to the executor or administrator by citation. An executor or administrator, not petitioning, or any person interested in the estate may resist the application.

§ 1001. Order for Distribution: Prerequisites to Order: Bond. If, at the hearing, it appears that the estate is but little indebted and that all inheritance taxes payable in said proceeding have been paid, or that the State controller, an inheritance tax attorney, or an assistant inheritance tax attorney has in writing consented to said distribution and the legacy, devise or share of the estate, or any portion thereof, may be distributed to the person entitled thereto without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver the legacy, devise or share of the estate or such portion thereof as the court may designate, to the person entitled thereto, upon receiving from such person a bond executed by him, and payable to the executor or administrator in such sum as the court may designate, with sureties to be approved by the judge, and conditioned for the payment, whenever required, of the proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate, so ordered to be delivered. ***

Although section 300 of the California probate code provides that title to the property of a deceased person passes to his heirs, devisees, or legatees, it also provides that the title so passes "subject to the possession of the executor or his administrator and to the control of the superior court for the purpose of administration, sale or other disposition" and "shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family." See *Dabney v. Dabney*, 129 Pac. (2d) 470. In the *Estate of B. Brasley Cohen*, 8 T. C. 784, involving a California estate, the question considered was whether the legatees had a present right under California law to obtain or compel a distribution of all the income during the taxable year. This Court concluded that the legatees did not have "a recognized present right under local law to obtain income or compel a distribution of income" (Regulations 111, sec. 29.162-2(b)), stating:

The legatees did have the privilege of petitioning the court, which they did not exercise, and if they had established certain facts the local court could have, in its discretion, ordered a distribution of the designated portion of the estate. We think the privilege of soliciting the local court's discretion is not the equivalent of a present right to compel distribution.

The will involved herein contains no direction for the payment of the income received during the administration of the estate to the residuary beneficiaries. Petitions were filed with the court for a distribution of the 1942 income to the extent of \$181,000

and of the 1943 income to the extent of \$96,000. No other petition for the distribution of income was addressed to the court either by petitioners or any of the beneficiaries under the will and no further distribution of 1942 and 1943 income was authorized. The possession and handling of the property of an estate by the executor are subject to the control of the court and the executor derives his power to act from the order of the court. *In Re Palm's Estate*, 156 Pac. (2d) 62, 66; Sec. 300, California Probate Code. The testimony of the judge of the Superior Court of San Francisco County, in which court the will involved herein was admitted to probate, to the effect that, had petition been made therefor, he would have issued an order in 1942 and 1943 for the distribution of all the income received by the estate during such years, is not determinative. Neither is it material that the bank to which the estate was indebted on a \$500,000 loan, or the inheritance tax attorney, would have consented to such distribution had petition been made therefor. The facts as they actually existed during the taxable year are determinative. *American Potash & Chemical Co.*, 7 T. C. 1113, 1116.

The facts herein are materially different from those in *William C. Chick*, 7 T. C. 1414. In that case the will of decedent was allowed for probate in March 1929. William C. Chick, the son of decedent, who was named both as executor and trustee under the will, immediately qualified as executor and shortly thereafter qualified as trustee. All acts necessary to complete and wind up the administration of the estate

of decedent had been fully performed prior to the taxable year 1940, except that the assets comprising the residuary estate had not been transferred by the executor to himself in trust for the benefit of himself and his sister, as provided under the will. Under the terms of the testamentary trust the net income of the residuary trust was currently distributable in equal shares to the two beneficiaries. This Court approved the determination of the Commissioner that the estate in 1940 was no longer in process of administration and that the income of the estate was taxable to the two beneficiaries of the residuary trust under section 162(b).

Herein, decedent died in August, 1941. The assets of the estate had an appraised value in excess of \$4,700,000. At the end of 1943 there were liabilities outstanding in excess of \$1,100,000. Although the Federal estate tax as disclosed by the return had been paid, the Commissioner subsequently determined that the estate was liable for a deficiency, which controversy was not settled until November, 1946. There is no showing that the process of administration had been continued unreasonably or that the ordinary duties pertaining to the administration and settlement of the estate had been completed prior to the taxable years. Sec. 29.162-1(c), Regulations 111.

It is true in that the case of *In Re Stephenson's Estate*, 150 Pac. (2d) 222, upon which petitioners primarily rely, it is stated that "It is made mandatory by section 1001 that the court make the order of distribu-

tion." The court, however, immediately modifies that statement, for it continues as follows:

* * * for it is there provided that *if it appears* that the estate is but little indebted and that inheritance taxes have been paid and that the distribution of the portion of the estate may be made without loss to creditors or injury to others "the court shall make an order" for the delivery of the share of the estate or such portion thereof as the court may designate to the person entitled thereto. * * *

The Probate Code clearly gives power to the court to order a partial distribution of an estate and, *given the prescribed conditions*, it is made mandatory upon the court to make the order. But to exercise that power accurately it is necessary that it first be determined what persons are entitled to the order and what portion or portions of the estate should be distributed to them. * * *

The court thus recognizes that the mandate is subject to certain conditions, so that in the last analysis the order of distribution is subject to the judgment and discretion of the probate court.

The beneficiaries had no present right to the 1942 and 1943 income. They merely had a potential right thereto, which, as to the amount in dispute, was neither recognized nor enforced. The 1942 and 1943 income of the estate was not income of the estate "to be distributed currently" as provided in section 162 (b). *Estate of Andrew J. Igoe*, 6 T.C. 639.

Neither is the estate entitled to any deduction for 1942 and 1943 under section 162 (c) in addition to the amounts actually distributed out of income. There is no evidence that the undistributed 1942 and 1943 income was properly credited to any of the beneficiaries, as required by the statute. *Commissioner v. Stearns*, 65 Fed. (2d) 371; certiorari denied, 290 U.S. 670.

The facts and circumstances in *Estate of Andrew J. Igoe*, supra, are wholly different from the facts and circumstances herein. In that case specific credits of the distributive share of income were made to the account of each beneficiary. They were notified of their respective distributive shares; they received numerous large payments in cash, which were charged to their accounts with the estate; and the actions of the executors in so treating the income earned by the estate were approved in all respects by the court having jurisdiction over the settlement of their accounts. Herein, the residuary beneficiaries may never have received the 1942 and 1943 income retained by the executors. There is no evidence showing what disposition was made of such income by petitioners.

The petitioners further contend that, having distributed property of the value of \$1,146,000 in addition to the distribution of \$181,000 in 1942, the estate is entitled to a deduction of the entire income in 1942, and, having distributed property of the value of \$30,950 in addition to the distribution of \$96,000 in 1943, the estate is entitled to a deduction in 1943 to the

extent of \$126,950, under section 162 (d) (1) of the code.⁴

The respondent argues that there is no occasion for the application of section 162 (d), since the amounts of income and corpus distributed by the estate are clearly identifiable, and that the orders of the probate court are binding in this respect.

Subsection (d) (1) is made specifically not applicable to any amount paid, credited, or to be distributed "under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals." The bequest and devise under which the distributions of

***SEC. 162. NET INCOME.**

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(d) **RULES FOR APPLICATION OF SUBSECTIONS (b) AND (c).**—For the purposes of subsections (b) and (c)—

(1) **AMOUNTS DISTRIBUTED OUT OF INCOME OR CORPUS.**—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust. * * *

income and corpus herein were made was a bequest and devise of the residue of the estate of decedent after payment of all debts, specific legacies, and administration expenses. That the residue was paid in installments, consisting of income or corpus, is immaterial and does not convert the bequest and devise into one distributable at intervals within the meaning of section 162 (d) (1).

Subsection (d) was added to section 162 by section 111 (c) of the Revenue Act of 1942 as a complement to the amendment of section 22 (b) (3) and for purposes of clarity. Ways and Means Committee Report No. 2333, 77th Cong., 2d sess., sec. 110, pp. 66-68; Report of the Committee on Finance, No. 1631, 77th Cong., 2d sess., sec. 111, pp. 69-75. Section 110 of the Ways and Means Committee report is captioned "Annuity Trusts." The section states that the construction of the existing law as contained in *Irwin v. Gavit*, 268 U. S. 161, was written into the amendment of section 22 (b) (3) and that both the amendment to section 22 (b) (3) and section 162 changed the treatment of gifts, bequests, devises, and inheritances of amounts to be paid in any event out of income or corpus, such as involved in *Burnet v. Whitehouse*, 283 U. S. 148; and *Helvering v. Pardee*, 290 U. S. 365. The Committee's report states that such changes involved:

* * * treating such amounts, if under the terms of the gift, bequest, or inheritance the payment, crediting, or distribution thereof is to be made at intervals, as gifts, bequests, devises, or inheritances if income from property to the extent that

such amount is paid, credited, or to be distributed out of income from property. * * * [P. 67.]

As a complement to the amendment of section 22 (b) (3) and for purposes of clarity, section 162 of the Code is also amended by adding a new subsection designated as "(d)". This subsection provides a formula for allocating income of an estate or trust to legatees and beneficiaries in order to make the source of distribution clear and to prevent tax avoidance by distributions claimed to be other than out of income or out of income other than income for the current taxable year. It is immaterial under the rule stated in section 162 (d) whether income is used to make the distribution, whether such distribution may, in the discretion of the fiduciary, be made out of other than income, or whether the terms of the will or trust instrument direct that amounts other than income be used to assure the beneficiary the payment of a specified sum at stated intervals.

* * * [P. 68.]

In section 111 of the report of the Committee on Finance, p. 69, it is stated:

This section is basically the same as section 110 of the bill passed by the House, relating to annuity trusts. Although numerous changes have been made by your committee, such changes are designed to give further and more detailed application of the principles of section 110 of the House bill rather than to change its fundamental theory.

See also section 29.162-2 of Regulations 111, dealing with section 162 (d) (1), which is entitled "Alloc-

tion of Estate and Trust Income to Legatees and Beneficiaries.—(a) *Allocation among annuitants.*” From the foregoing, it is obvious that amounts paid out of corpus on a bequest and devise as herein involved are not within the purpose and scope of subsection (d).

Since the bequest and devise of the residuary estate herein is a bequest and devise “not to be paid, credited, or distributed at intervals,” subsection (d) of section 162 is not applicable.

Petitioners are entitled only to the deduction in 1942 and 1943 of the amount actually distributed out of income under section 162 (c). In view of our holding, the respondent is entitled to increased deficiencies. Under the stipulated facts, petitioners distributed out of income \$180,297.85 in 1942 and \$94,164.15 in 1943, instead of \$181,000 and \$96,000, respectively, allowed by respondent in his original computation.

Decision will be entered under Rule 50.

APPENDIX "C"

California Probate Code (Deering's California Codes, Annotated, 1944):

§ 300. *Title to decedent's estate: [When property passes: Possession and control thereof: Liability for administration expenses, debts and family allowance].* When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code.

§ 956. *Closing administration: [Payment of legacies: Distribution: Debts unpaid: Condition of estate].* If all of the debts have been paid by the first order for payment, the court must direct the payment of legacies and the distribution of the estate among the persons entitled, as provided in the next chapter; but if there are debts remaining unpaid, or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for such time as may be reasonable.

§ 1000. *Petition [by person entitled: Hearing: Notice: Persons entitled to oppose].* At any time after the lapse of four months from the

issuing of letters testamentary or of administration, the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court to distribute a legacy, devise or share of the estate, or any portion thereof, to any person entitled thereto, upon such person giving a bond as hereinafter provided. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. When the petitioner is not the executor or administrator, notice must be given to the executor or administrator by citation. An executor or administrator, not petitioning, or any person interested in the estate may resist the application.

*§ 1001. Allowance of distributee's share:
[Facts shown at hearing: Indebtedness to estate:
Taxes: Possibility of loss or injury: Order for
delivery: Bond of recipient].* If, at the hearing, it appears that the estate is but little indebted and that all inheritance taxes payable in said proceeding have been paid, or that the State Controller, an inheritance tax attorney, or an assistant inheritance tax attorney has in writing consented to said distribution and the legacy, devise or share of the estate, or any portion thereof, may be distributed to the person entitled thereto, without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver the legacy, devise or share of the estate or such portion thereof as the court may designate, to the person entitled thereto, upon receiving from such person a bond executed by him, and pay-

able to the executor or administrator in such sum as the court may designate, with sureties to be approved by the judge, and conditioned for the payment, whenever required, of the proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate, so ordered to be delivered. When the time for filing or presenting claims has expired, and all uncontested claims have been paid or are sufficiently secured by mortgage or otherwise, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond.

§ 1010. *Petition: [Setting for hearing: Notice: Persons entitled to oppose].* When the time for filing or presenting claims has expired and all uncontested claims have been paid, or are sufficiently secured by mortgage, or otherwise, but the estate is not in a condition to be finally closed and distributed, the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court for a ratable payment of the legacies, or ratable distribution of the estate, to the heirs, devisees or legatees, or their assignees, grantees or successors in interest, or, where there are priorities, to those of the class or classes having priority; or, if the decedent was a nonresident and left a will which has been duly proved or allowed in the State of his residence, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, or it is for the best interests of the estate, that any part of the estate in this State should be delivered to the executor or administrator in the State of the decedent's residence, the executor or administrator may petition the court for an order authorizing the delivery of

such portion of the estate as the court shall deem safe and proper and for the best interests of the estate, to the executor or administrator in the State of the decedent's residence. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. Any person interested in the estate or any coexecutor or coadministrator may resist the application.

§ 1011. [*Hearing: Showing of essential facts: Order requiring distribution*]. If, at the hearing, it appears that the allegations of the petition are true, that all inheritance taxes payable in said proceeding have been paid or that the State Controller, an inheritance tax attorney, or an assistant inheritance tax attorney, has in writing consented to said distribution, and that no injury will result to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver to the heirs, devisees or legatees, or to their assignees, grantees or successors in interest, or to the executor or administrator in the State of decedent's residence, such portion of the estate as the court may designate.

§ 1021. [*Decree of distribution: Naming of persons and shares: Right to recover shares: Conclusiveness of decree*]. In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees.

* * * * *

Internal Revenue Code:

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

(26 U. S. C. 1940 ed., Sec. 161)

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) [as amended by Section 111 (b), Revenue Act of 1942, c. 619, 56 Stat. 798]: There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, 'income which is to be distributed currently' includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary;

(d) [as added by Section 111(c), Revenue Act of 1942, c. 619, 56 Stat. 798] *Rules for Application*

of Subsections (b) and (c).—For the purposes of subsections (b) and (c)—

(1) *Amounts Distributable Out of Income or Corpus.*—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed, if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust. For the purposes of this paragraph “distributable income” means either (A) the net income of the estate or trust computed with the deductions allowed under subsections (b) and (c) in cases to which this para-

graph does not apply, or (B) the income of the estate or trust minus the deductions provided in subsections (b) and (c) in cases to which this paragraph does not apply, whichever is the greater. In computing such distributable income the deductions under subsections (b) and (c) shall be determined without the application of paragraph (2).

* * * * *

(26 U. S. C. 1940 ed., Sec. 162.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.162-1. INCOME OF ESTATES AND TRUSTS.—

* * * * *

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

* * * * *

(b) Any income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to a legatee, heir, or beneficiary, whether or not such income is actually distributed. For this purpose, it is provided in section 162(b) that "income which is to be distributed currently" includes income of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary.

(c) Any income of the estate of a deceased person for its taxable year which is properly paid or credited during such year to a legatee or heir, and any income either of such an estate or of a trust for its taxable year which is similarly paid or credited during that year to a legatee,

heir, or beneficiary if there was vested in the fiduciary a discretion either to distribute or to accumulate such income.

The income of an estate of a deceased person, as dealt with in the Internal Revenue Code, is therein described as received by the estate during the period of administration or settlement thereof. The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. * * *

SEC. 29.162-2. ALLOCATION OF ESTATE AND TRUST INCOME TO LEGATEES AND BENEFICIARIES.—(a) Allocation among annuitants.—Section 162(d)(1) applies to all cases in which the executor or trustee can or must (for example, by the terms of the trust instrument or will) pay the whole or any part of a gift, bequest, devise, or inheritance out of other than income, except that no income is to be allocated under it to a legatee, heir, or beneficiary of a lump sum gift, bequest, devise, or inheritance. It applies in all cases of annuities where any deficiency in the amount to be paid can be made up by a payment out of corpus of the trust. It also applies in cases where amounts are to be paid or credited at intervals and the executor or trustee has discretion whether to pay or credit such amounts out of income or corpus, regardless of the source (income or corpus) to

which the executor or trustee attributes such amount. * * *

(b) *Allocation among income beneficiaries and legatees.*—* * * As used in section 162, the term "income which becomes payable" means income to which the legatee, heir, or beneficiary has a present right, whether or not such income is actually paid. Such right may be derived from the directions in the trust instrument or will to make distributions of income at a certain date, or from the exercise of the fiduciary's discretion to distribute income, or from a recognized present right under the local law to obtain income or compel a distribution of income. Income is not considered to become payable within a taxable year where during the entire taxable year there is only a future right to such income. For example, under valid terms of a trust instrument, income received by a trust during its taxable year is to be accumulated until the twenty-first birthday of the beneficiary (or his prior death), at which time the accumulated income is to be distributed to the beneficiary (or his estate, as the case may be). In such case, the income of the trust received in any taxable year prior to the taxable year of the trust in which the date of distribution occurs (the beneficiary's twenty-first birthday or his prior death) is not income which becomes payable within such prior taxable year but is income which becomes payable in the taxable year of the trust in which the date of distribution occurs. In any case, income becomes payable at a date not later than the date it is actually paid for the use of the distributee.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No.

ESTATE OF ISADORE ZELLERBACH, De-
ceased, J. DAVID ZELLERBACH and
HAROLD L. ZELLERBACH, Executors,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

PRELIMINARY STATEMENT.

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of statutes involved, summary statement of the case, questions presented and reasons for granting the writ.

In the following argument, due to the fact that the Circuit Court of Appeals did not write a separate opinion, but affirmed the decision of the Tax Court, "On the ground and for the reasons stated in its (the Tax Court's) opinion", we, throughout our argument refer to the opinion of the Tax Court, rather than the opinion of the Circuit Court of Appeals.

ARGUMENT.

I.

THE TAX COURT (AND THE CIRCUIT COURT OF APPEALS) MIS-INTERPRETED THE PROBATE LAW OF THE STATE OF CALIFORNIA, AS A RESULT OF WHICH THE TAX COURT ERRED IN FAILING TO ALLOW AS A DEDUCTION FROM THE PETITIONER'S GROSS INCOME FOR EACH OF THE YEARS 1942 AND 1943 THE FULL AMOUNT OF PETITIONER'S INCOME FOR EACH OF SAID YEARS.

AN ESTATE OF A DECEDENT (PETITIONER HEREIN) IS ALLOWED AN ADDITIONAL DEDUCTION IN COMPUTING THE NET INCOME OF THE ESTATE, THE INCOME WHICH IS DISTRIBUTED TO THE HEIRS OR LEGATEES OR THE INCOME WHICH IN THE DISCRETION OF THE EXECUTOR MAY BE EITHER DISTRIBUTED OR ACCUMULATED.

The petitioner contends, among other things, that under the provisions of Section 162 of the Internal Revenue Code, that the estate of the decedent (petitioner herein) is allowed an additional deduction in computing the net income of the estate, the income which is distributed to the heirs or legatees, or the income which in the discretion of executors may be either distributed or accumulated; that notwithstanding

ing the fact that Probate Court orders were not obtained authorizing the distribution of all of the income of the estate for the particular years involved in this petition under the particular facts in this case, the provisions of Section 162 of the Internal Revenue Code and the Commissioner's Regulations based upon this section, and which are set forth at length in appendix "C", supra, it will be deemed that such income was in fact distributed to the heirs or legatees, and accordingly the estate is entitled to a credit for the full amount thereof, namely Sections 29.162-1 and 29.162(b) of Treasury Regulations.

We turn now to the evidence in this case and an analysis of the California Probate Code as applicable herein, namely Sections 956, 1000 and 1001, which sections are set forth in Appendix "C".

The evidence in this case shows that the decedent died on August 7, 1941, and that his will was admitted to probate on September 2, 1941, and that on November 25, 1942, when the executors filed two petitions for partial distribution (Exhibits "G" and "I", stipulation of facts, Tr. pp. 62 to 65), more than one year had expired since the issuance of letters testamentary.

The evidence further shows that the estate, comparatively speaking, was little indebted; that the principal indebtedness was to the Wells Fargo Bank & Union Trust Co. of San Francisco, which indebtedness was amply secured. Julius Eisenbach, who was called as a witness by the petitioner, testified that he was vice president of the Wells Fargo Bank & Union

Trust Co., in charge of credits (Tr. p. 128); that in 1942, if the executors had requested the Wells Fargo Bank & Union Trust Co. for permission to distribute the estate without paying the loan, the bank would have consented. (Tr. p. 130.)

Richard C. O'Connor was another witness who testified on behalf of the petitioner. He testified he was a Deputy Inheritance Tax Attorney for the State of California, connected with the State Controller's Office of the State of California, which office has charge of inheritance taxes for the State of California, and that as such Deputy Inheritance Tax Attorney, he had under his jurisdiction in 1942 the Estate of Isadore Zellerbach, deceased (Tr. p. 124); that if a request had been made to his office in 1942 for a distribution of the entire income of the estate for the year 1942, without the payment of the inheritance taxes that his office would have consented to such distribution. (Tr. pp. 125 to 126.)

A partial distribution may be made without payment of inheritance taxes if the State Controller, an Inheritance Tax Attorney or an Assistant Inheritance Tax Attorney consents to such distribution in writing.

California Probate Code, Section 1001;

Estate of Johnson, 218 Cal. 501, p. 504;

Estate of Webster, 60 Cal. App. (2d) 524, p. 528.

As hereinafter appears, the State Controller did give his consent to the distributions which were made.

The will of the decedent directs that the residue of the estate of the decedent be distributed three-sixths

to decedent's widow, Jennie B. Zellerbach, and three-sixths to decedent's children, one-sixth to each. (Exhibit "A", stipulation of facts, Tr. p. 34.) Based upon these provisions of the will, the executors filed their petitions for a partial distribution of the income in 1942 and 1943 (Exhibits "G" and "Q", stipulation of facts, Tr. pp. 62 to 65; Tr. pp. 93 to 96) and the decrees of partial distribution were based on these provisions of the will, namely, three-sixths of the income was distributed to the children. (Exhibits "H" and "R", stipulation of facts, Tr. p. 66 and pp. 97 to 99.) With respect to the decree made on December 7, 1942, (Exhibit "H", stipulation of facts, Tr. p. 66) as we pointed out, an arbitrary amount of \$22,000.00 was distributed to the widow, whereas in the decree made on December 13, 1943 (Exhibit "R", stipulation of facts, Tr. pp. 97 to 99) no amount whatsoever was distributed to the widow.

At this time we would like to call particular attention to the following language which appears in the decree of December 7, 1942 (Exhibit "H", stipulation of facts, Tr. pp. 66 to 67), and which appears in substantially the same form in each and every other decree of partial distribution.

"The Court, after hearing the evidence, finds that all the allegations of said petition are true; that the time for filing claims against said estate has expired; that all claims which have been filed have been allowed, approved and paid; that the federal estate tax, as shown by the return, has been paid; that the State Controller of the State of California has consented in writing to the said

distribution; that all personal property taxes due and payable by said estate have been paid; that the distribution prayed for in said petition may be allowed as therein prayed for without injury to said estate or any person interested therein, and that after said distribution sufficient assets will remain in the hands of the executors to pay all debts and expenses of administration;"

The Court having made such a finding and having distributed one-half of the income in both 1942 and 1943 to the children, we contend that if either the executors or the widow had petitioned in each of said years to distribute the full one-half of the income to the widow for each of said years, it would have been mandatory for the Court to have granted such petitions.

In support of this contention, we call attention to a comparatively recent decision of the California District Court of Appeal for the Second District (hearing denied by California Supreme Court) entitled "*Estate of Henry S. Stephenson, deceased*", reported in 65 Cal. App. (2d) 120, wherein the Court states on page 123 of the opinion:

"The proceedings for partial distribution of an estate prior to final distribution have been authorized at all times since the establishment of the probate courts in California. The provisions now in effect on the subject are sections 1000 and 1001 of the Probate Code. *It is made mandatory by section 1001 that the court make the order of distribution*, for it is there provided that if it appears that the estate is but little indebted and

that inheritance taxes have been paid and that the distribution of the portion of the estate may be made without loss to creditors or injury to others 'the court shall make an order' for the delivery of the share of the estate or such portion thereof as the court may designate to the person entitled thereto.

* * * * *

"The Probate Code clearly gives power to the court to order a partial distribution of an estate and, given the prescribed conditions, it is made mandatory upon the court to make the order."

(Italics ours.)

See also the leading case of *In re Crocker*, 105 Cal. 368, at page 371, where the California Supreme Court stated:

"The finding by the court that the estate was but little indebted is objected to by appellants upon the ground that these words are intended to 'operate only where, as a matter of fact and absolutely, the estate, no matter what its size, was but little indebted.' These statutory words were intended to be used relatively, and not absolutely, and they merely refer to a 'condition of things in which the debts are small when considered in connection with the value of the estate.' Hence, it follows that the contention of appellants on this point cannot be sustained."

To the same effect, see:

Estate of Chesney, 1 Cal. App. 30, at p. 34;
Estate of Hinkel, 176 Cal. 563, at p. 566.

We also call attention to the testimony of Judge Timothy I. Fitzpatrick, the Probate Judge, in whose

Court and under whose jurisdiction the decedent's estate was being probated. He testified that if petitions had been presented to him in 1942 and 1943 by the executors or the legatees for the distribution of the entire income of the estate for each of said years, he would have granted such petitions. (Tr. pp. 115 to 122.)

The Tax Court in its opinion, in discussing the foregoing case of the *Estate of Henry S. Stephenson, deceased*, supra, states as follows:

"It is true that in the case of In Re Stephenson's Estate, 150 Pac. (2d) 222, upon which petitioners primarily rely, it is stated that 'It is made mandatory by section 1001 that the court make the order of distribution.' The court, however, immediately modifies that statement for it continues as follows:

* * * for it is there provided that if it appears that the estate is but little indebted and that inheritance taxes have been paid and that the distribution of the portion of the estate may be made without loss to creditors or injury to others 'the court shall make an order' for the delivery of the share of the estate or such portion thereof as the court may designate to the person entitled thereto. * * *

The Probate Code clearly gives power to the court to order a partial distribution of an estate and, given the prescribed conditions, it is made mandatory upon the court to make the order. But to exercise that power accurately it is necessary that it first be determined what persons are entitled to the order and what portion or portions of the estate should be distributed to them. * * *

The court thus recognizes that the mandate is subject to certain conditions so that in the last analysis the order of distribution is subject to the judgment and discretion of the Probate Court.

The beneficiaries had no present right to the 1942 and 1943 income. They merely had a potential right thereto, which, as to the amount in dispute, was neither recognized nor enforced. The 1942 and 1943 income of the estate was not income of the estate 'to be distributed currently' as provided in section 162(b). Estate of Andrew J. Igoe, 6 T. C. 639."

However, we point out, with all due respect to the Tax Court, that it overlooked three very important facts which were present in the Estate of Isadore Zellerbach (petitioner herein), and which facts no longer gave the Probate Court any discretion with reference to the petitions for partial distribution but would have made it mandatory to grant said petitions.

First, as we have already pointed out, in the decrees of partial distribution by which a portion of the income was distributed in both the years 1942 and 1943, the Court found that the time for filing claims against the estate had expired; that all claims which had been filed had been allowed, approved and paid; that the federal estate tax, as shown by the return had been paid; that the State Controller had consented in writing to the distribution; that all personal property taxes due and payable by the estate had been paid, and that the distribution prayed for in the petition could be allowed as prayed for therein without injury

to the estate or any person interested therein, and that after the distribution sufficient assets would remain in the hands of the executors to pay all debts and expenses of administration.

Accordingly, the Court made a finding on every point which would be necessary for it to have exercised its discretion, but having found as it did it no longer had any discretion to exercise, and the duty became mandatory upon the Probate Court to make the partial distribution. This is clearly illustrated by the language of the decision *In re Stephenson, supra*, quoted by the Tax Court, wherein the California District Court of Appeal stated: "and, given prescribed conditions, it is made mandatory upon the court to make the order."

See also *Estate of Clifford*, 16 Cal. App. (2d) 123, wherein the Court states, at pages 126-127:

"It is ordinarily true that all proper issues of facts joined in probate proceedings like any civil action must be determined and that the court should adopt appropriate findings respecting such issues. (Sec. 1230, Probate Code; *Estate of Pendell*, 216 Cal. 384 [14 Pac. (2d) 506]; *Estate of Exterstein*, 2 Cal. (2d) 13 [38 Pac. (2d) 151]; 11A Cal. Jur. 171, sec. 104; 11B Cal. Jur. 707, sec. 1228.) In the order for partial distribution which was signed and filed in this proceeding the court did find:

'That all inheritance taxes due from the distributees and all personal property taxes due and payable by the estate, have been paid; and that said estate is but little indebted, and that the

share of the petitioner asked for may be allowed to him without loss to creditors of the estate, and that no injury can result to the estate therefrom,

* * *

'It is ordered * * * that the said Gladys Vice, as the administratrix with the will annexed of said estate, forthwith deliver to E. E. Keyes * * * the following described property, to-wit, the sum of One Thousand Dollars, * * *'

The preceding findings include a determination of all the ultimate facts which are required by sections 1000 and 1001 of the Probate Code on a petition for partial distribution."

All the prescribed conditions were present in the Estate of Isadore Zellerbach. If the executors had petitioned for the distribution of the entire income in 1942 instead of only a portion of the income, the prescribed conditions would not have changed because, as the record shows, on the very same day that the executors filed a petition for partial distribution of \$181,000 in income out of a total of \$317,000 income for said year (Tr. pp. 62 to 65), they filed a petition for a partial distribution of corpus of the trust estate (Tr. pp. 68 to 72), which corpus it was agreed had a fair market value on the date it was distributed of \$1,146,000. (Paragraph 25, stipulation of facts, Tr. p. 28.) The decree distributing the income was made on December 7, 1942 (Tr. pp. 66 to 68), and by that decree of distribution the \$181,000 of income was there distributed arbitrarily to the widow \$22,000, and the balance was distributed \$53,000 to each of the children, the latter amount representing one-sixth of the

estimated income for the year 1942, each of the children being entitled to one-sixth of the residue of the estate. (Tr. p. 67.) On the other hand the corpus of the trust estate which was distributed on December 8, 1942 was distributed one-half to the widow and one-sixth to each of the children, which was in accordance with the will. (Tr. p. 74.)

Secondly, it is axiomatic that if the executors or Jennie B. Zellerbach had petitioned the Probate Court for a distribution of one-half of the full income of the estate for the year 1942, after the decree for partial distribution had been made, that the Probate Court would have had no alternative but to have granted such petition, as it could not make a distribution to some of the residuary legatees of their proportionate share of the income and refuse to grant another residuary legatee her proportionate share of the income on like terms.

Practically the same situation prevailed for the year 1943. On November 30, 1943, it was estimated that the income of the estate for the year 1943 was the sum of \$191,500, and on that day the executors filed a petition to distribute one-half of that income to the three children, share and share alike, and did not request the distribution of any of the income to the widow who was entitled to the other one-half thereof. (Tr. pp. 93 to 97.) On December 13, 1943, the Probate Court made an order distributing the income as prayed for in said petition, and made the same findings as it had in its previous decrees of partial distribution. (Tr. pp. 97 to 99.)

However, during the earlier part of the year 1943 when the executors had desired to distribute a part of the corpus of the trust estate, they petitioned to distribute it one-half to the widow and one-sixth to each of the children. (Petition for partial distribution filed June 18, 1943, Tr. pp. 80 to 83; petition for distribution filed August 4, 1943, Tr. pp. 87 to 90.) The decree for partial distribution granting these petitions, distributed this property in accordance with the prayer of the respective petitions. (Tr. pp. 84 to 86, and 91 to 93.)

In view of the foregoing, we submit that the record in this case shows, without question, that Jennie B. Zellerbach, decedent's widow, had a "present right" in both 1942 and 1943 to one-half of the entire income of the estate for each of said years, and that such right came both from the executors' discretion to distribute income and from the probate law of the State of California. That she recognized such right is evidenced by the fact that on January 24, 1944, she filed an amended income tax return for the year 1942, wherein she reported as having been distributed to her one-half of the income for the Estate of Isadore Zellerbach for the year 1942 (Paragraph 28, stipulation of facts, Tr. p. 29), and in her income tax return for the year 1943 she included one-half of the income of the estate for said year. (Paragraph 29, stipulation of facts, Tr. p. 29.)

The third point we urge is that the fact that the income was not paid to Jennie B. Zellerbach does not alter the situation, for as we have already pointed

out, Section 29.162-2(b) of the Regulations provides in part as follows:

"As used in Section 162, the term 'income which becomes payable' means income to which the legatee, heir, or beneficiary has a present right, whether or not such income is actually paid. Such right may be derived from the directions in the trust instrument or will to make distributions of income at a certain date, or from the exercise of the fiduciary's discretion to distribute income, or from a recognized present right under the local law to obtain income or compel a distribution of income."

We would also like to call attention to the language of the Tax Court in the case of *Mary Pyne Filley v. Commissioner*, 45 B.T.A. 826, which while a trust case and prior to the adoption of the 1942 amendment, nevertheless contains language which we contend strongly supports our contentions. We quote in part from the opinion starting at page 829, as follows:

"It is provided in section 162(b) of the Revenue Act of 1936 that a trust shall be allowed a deduction of the amount of the income of the 'trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries', and in Section 162(c) that 'in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated', the amount which is properly paid or credited during such year to the beneficiary shall be allowed as a deduction. The amount allowed as a deduction under either of the above provisions is required to be included in comput-

ing the net income of the beneficiary. The Commissioner has made his determination upon the theory that the income of each trust was taxable to the beneficiary under Section 162(b) as income which was to be distributed currently by the fiduciary to the beneficiary. Actual receipt by the beneficiary during the taxable year is not essential under that provision. Cf. *Freuler v. Helvering*, 291 U. S. 35; *Willcuts v. Ordway*, 19 Fed. (2d) 917. The petitioner contends that the trustee had the discretion to accumulate the income of this trust or to distribute it to the beneficiary, consequently, (c) applies, and, since none of the income was actually paid to the beneficiary during the year, none of it is taxable to the petitioner. Although the proof does not show that the income was not properly credited to the petitioner during the year, decision need not turn upon this failure of proof.

'Accumulated' in (c) is used in opposition to 'distributed currently' in (b). The latter is intended to cover all cases where the trust instrument imposes a duty upon the trustees to make a prompt or periodic distribution of the trust income to the beneficiary. *Commissioner v. Stearns*, 65 Fed. (2d) 371; *Commissioner v. First Trust & Deposit Co.*, 118 Fed. (2d) 449, affirming 41 B.T.A. 107; *Freuler v. Helvering*, supra; *Florence M. Smith, Executrix*, 5 B.T.A. 225. Cf. *Albert J. Appell et al., Executors*, 10 B.T.A. 1225. (c), by its express terms, covers only those cases where the fiduciary has the right and the duty to choose between prompt distribution and accumulation beyond the time when a prompt distribution would normally have been made. Dis-

cretion requires the exercise of judgment and reason. It involves consideration of whether, on the one hand, there is good reason to distribute and no justification for withholding, or whether, instead, he should deliberately refrain from distributing at the usual time and withhold for some definite reason which, in his opinion, better carries out the purpose of the trust than would a current distribution. A provision for the distribution of 'net' income does not make (b) inapplicable. This is so even though distribution is not to be made until after the close of the year in which the income is earned by the trust. Income which is distributed annually is being distributed currently, as well as promptly and periodically, and comes within (b) upon authority of the cases above cited. The grantor in the present case did not intend that the income of either trust should be accumulated within the meaning of that word as it is used in (c), but intended that the income should be distributed currently to the beneficiary within the meaning of (b). This is apparent from the words he used in the trust instruments. Similar words have been similarly interpreted. Cf. *Leo A. Balzereit et al., Guardians*, 38 B.T.A. 345; affd., 107 Fed. (2d) 1008; *Leonard Marx*, 39 B.T.A. 537; *Sewell v. United States*, 19 Fed. Supp. 657. The only discretion given under the two trusts here in question was a discretion to the trustees of the *inter vivos* trust to pay the income directly to the beneficiary or to apply the same to her use and benefit. That is not a discretion to accumulate within the trust and is not the kind of discretion which brings the case within (c). The income

was not to be accumulated, but was to be distributed currently, either directly to the beneficiary or for her use and benefit. It is taxable to the beneficiary."

In *Estate of Andrew J. Igoe v. Commissioner*, 6 T. C. 639, income was credited on the books of the estate to the beneficiaries who were the residuary legatees under the decedent's will. Although the income was not paid, it was reported by each beneficiary in his income tax return and the executors deducted the amounts so credited from the income of the estate. The petitioners contended that the entire net income of the estate was "constructively paid" to the beneficiaries as provided in Section 162(c) of the Internal Revenue Code. They agreed that the sums placed to their credit on the books of the estate were both legally and practically available upon demand. The Tax Court, speaking through Judge Van Fossan, sustained the petitioners' contention.

We therefore submit that in view of the record in the instant case the Tax Court clearly erred when it stated in its opinion that "The beneficiaries had no present right to the 1942 and 1943 income. They merely had a potential right thereto, which, as to the amount in dispute, was neither recognized nor enforced. The 1942 and 1943 income of the estate was not income of the estate 'to be distributed currently' as provided in Section 162(b)." (Tr. p. 152.)

This error was the result of an erroneous interpretation of the California Probate Laws which adversely affected the petitioner in this matter.

We believe the Tax Court completely overlooked the provisions of Section 29.162-1 of Regulations 111, and Section 29.162-2b of the same regulations.

We can see no appreciable difference between the *Igoe* case, *supra*, and the case at bar, although the opinion of Judge Fossan in the instant case attempts to draw a distinction. The executors, by setting forth in their petitions for partial distribution that they had certain amounts of income available for distribution and petitioning for and being granted the right to distribute one-half of the income pro rata to the children who, as residuary legatees, were collectively entitled to one-half of the residue of the estate, *ipso facto* admitted that they were holding the other half of the income for the use and benefit of the widow who was the other residuary legatee.

It needs no citation of authority to the effect that executors may not discriminate in favor of one residuary legatee as against another. The income was "available" to the widow on demand, and as we pointed out above, if she had petitioned the Probate Court to distribute it to her, it would have been mandatory for the Court to have so distributed it to her. That she "acquiesced" in such action is evidenced by the fact that she included all of the income that she was entitled to receive in both her 1943 income tax return and her amended return for 1942. The income had been credited to her, it was available to her and would have been paid either if she or the executors had asked for formal permission to distribute it.

In view of the foregoing, we respectfully submit that the estate is entitled to a credit for the full amount of the distributable income for the years 1942 and 1943, and the Tax Court erred in disallowing such deductions. We will, however, set forth additional grounds which, in our opinion, entitles the estate to such credits.

RESIDUARY LEGATEES AND DEVISEES UNDER THE CALIFORNIA PROBATE LAW ARE ENTITLED TO PETITION FOR A DISTRIBUTION OF INCOME DURING THE ADMINISTRATION OF THE ESTATE.

In the preceding paragraphs we pointed out the distributions of income that had been made during the course of the administration of the estate. We now will cite the authority for distributions of income during the course of such administration.

The record in this case shows that prior to November 25, 1942, all gifts and legacies under the decedent's will had been paid (Exhibits "E", "F", and "G", stipulation of facts, Tr. pp. 55-65) and that the only estate that remained undistributed was the residue.

Under the California Probate Code, Section 300, the title to a decedent's property, both real and personal, passes to the person to whom it is devised or bequeathed by his last will and testament, subject to the possession of the executor and the control of the Superior Court for the purposes of administration, sale or other disposition as provided in the Probate Code, and is chargeable with the expenses of admin-

istering his estate, and the payment of his debts and the allowance to the family. (See *Noble v. Beach*, 21 Cal. (2d) 91, p. 94; *Reed v. Hayward*, 23 Cal. (2d) 336, p. 340.)

In General Counsel's Memorandum 22034-25-10297, page 3, Mr. Wenchel, the then chief counsel for the Bureau of Internal Revenue, states in part as follows:

"Advice is requested whether in the case of the estate of A, which was in process of administration during the year 1938, the income, including gains on the sale of capital assets realized and distributed by the executor in the year 1938, is taxable to the estate or to the distributees.

A died testate on April _____, 1938, a resident of the State of California. After providing for several specific bequests and the payment of his debts, the testator directed that the residue of the estate be divided into a specified number of equal parts and distributed to certain named persons. During the period from April _____, 1938 to December 31, 1938, the estate had a net taxable income of 17x dollars, including capital gains of 13x dollars derived from the sale of corpus of the estate. On November _____, 1938 the probate court ordered a payment of 55x dollars to residuary legatees, the order expressly providing that 17x dollars be paid out of income and the balance out of corpus. Payments were made by checks dated November _____, 1938 and on the income tax return filed for the estate a deduction was claimed for the amount of the payments from income. A's will made no provision for the distribution of income during the period of administration. Furthermore, with the exception of Section 1000

of the Probate Code of California, which permits any heir, devisee, or legatee to petition for a distribution after four months, the code of the State is silent regarding the distribution of income of an estate during administration.

Section 162(c) of the Revenue Act of 1938 provides in part as follows:

'In the case of income received by estates of deceased persons during the period of administration or settlement of the estate * * * there shall be allowed as an additional deduction in computing the net income of the estate * * * the amount of the income of the estate * * * for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heir, or beneficiary.'

In General Counsel's Memorandum 4596 (C. B. VII-2, 133 (1928) it was held (syllabus):

'Where a will is silent as to the disposition of income received during the period of administration, the laws of the particular State involved must be considered in order to determine whether current income or gain on sales of property may be "properly" paid or credited to residuary or other legatees during any given taxable year.'

It was stated in the last paragraph of that memorandum that 'Unless the will or the laws of the State make such payment or credit improper the amount paid or credited is deductible in computing the net income of the estate.'

Under the facts in the present case, it is the opinion of this office that the distribution di-

rectly to the beneficiaries of income, including capital gains, by the executor of the estate of A during the period of administration of the estate are deductible by the estate for Federal income tax purposes as income 'properly paid' under the provisions of Section 162(c) of the Revenue Act of 1938. Such income is taxable to the beneficiaries."

In the *Estate of Bernal*, 165 Cal. 223, where one of the questions involved was the determination as to who was entitled to rents and profits during administration of a parcel of land devised to certain persons, the California Supreme Court stated, at page 235:

"What we have said not only establishes the merit of the claim of the grandchildren as to the balance remaining unpaid on the mortgage debt and interest accruing thereon, but also disposes of the claim of the son that he is entitled to a credit on account of the one thousand five hundred dollars already paid on account of the principal of the mortgage debt. It further practically establishes as valid the claim of the grandchildren in regard to the rents and profits derived from the land. The title to the real property devised to them vested in them at the moment of the death of the testatrix, subject only to the possession of the executor for purposes of administration, including the payment of expenses of administration and debts in the order prescribed by law, in view of the provisions of the will. It was said in *Estate of Woodworth*, 31 Cal. 600: 'That is to say that the rents of the real estate accruing subsequent to the death of the testator, for the purpose of marshalling the assets, should be regarded as

belonging to the realty from which they were derived. Such was the rule at common law, and no change in this respect appears to be intended.' There is nothing in our statutes, so far as we have found, that is contrary to this view. We think the discussion in *Estate of Woodworth*, 31 Cal., at pages 604 and 605, sufficiently shows that this is true. The executor holds *all* the property of the estate for purposes of administration, including not only the rents and profits of land specifically devised, but the land itself, and all of this property is subject, if necessary, to disposition for the payment of expenses and debts. But in such a case as the one before us, we must primarily resort to a certain portion of the property of the deceased for such purposes, and cannot resort to the other portion until the *primary fund for such purposes is exhausted*. And here such primary fund is that given to the residuary legatees. As between him, he being the only other person interested in the estate, and the grandchildren, the net rents and profits of the real property specifically devised to the children, accruing since the death of deceased, are a part of such realty, and, there being sufficient other property to pay all debts and expenses in full, should have been awarded to the grandchildren. It was not, as between the son and the grandchildren, a proper application of any part thereof to pay the same on account of interest on the mortgage or on account of any expense of administration or debt of deceased." (Italics ours.)

In the *Estate of Matthiessen*, 23 Cal. App. (2d) 608, p. 614, the Court ordered rents of property which

had been collected by an executor during administration, paid to a devisee, the estate being solvent.

As we have several times pointed out, the assets of the estate, the "primary fund", were ample to pay all indebtedness of the estate, including all unpaid taxes. Accordingly, the residuary legatees in whom the title to the residue of the estate, as well as the title to the undistributed income, was vested, could petition at any time during 1942 and 1943 to have the income distributed to them in the proportions that they took under the will and by reason thereof, such income was income to which they had a present right which was not needed in the administration of the estate. By reason thereof, Jennie B. Zellerbach was required, under the provisions of the Internal Revenue Code and the Regulations, to include one-half of the entire distributable income for each of said years in her income tax return and the estate was entitled to a deduction therefor.

This is particularly true in view of the distribution of income on December 7, 1942, corpus on December 8, 1942, and again income on December 13, 1943.

II.

THE TAX COURT (AND THE CIRCUIT COURT OF APPEALS) IN AFFIRMING THE OPINION AND DECISION OF THE TAX COURT MISINTERPRETED THE PROVISIONS OF SECTION 162(d)(1) OF THE INTERNAL REVENUE CODE IN HOLDING THAT THIS SECTION ONLY APPLIES TO BEQUESTS AND DEVISES WHICH ARE TO BE PAID, CREDITED OR DISTRIBUTED AT INTERVALS.

UNDER THE PROVISIONS OF SECTION 162(d)(1) OF THE INTERNAL REVENUE CODE WHERE A DISTRIBUTION OF CORPUS OF AN ESTATE IS MADE IN ANY YEAR THAT THE ESTATE HAS DISTRIBUTABLE INCOME, THE DISTRIBUTION IS TAXABLE TO THE LEGATEE TO THE EXTENT OF THE DISTRIBUTABLE INCOME.

PETITIONER HAVING DISTRIBUTED TO THE RESIDUARY LEGATEES CORPUS OF A VALUE IN EXCESS OF DISTRIBUTABLE INCOME, IT IS DEEMED THAT ALL INCOME WAS DISTRIBUTED TO THE LEGATEES.

The petitioner contends that by reason of the provisions of Section 162(d)(1) of the Internal Revenue Code that it was entitled to a deduction for the year 1942 of the full amount of its income for that year by reason of the fact that in 1942 the estate of the decedent had distributed corpus of a value in excess of the distributable income for that year; that for the year 1943, it having distributed corpus of a value of \$30,950.00 and having distributable income in excess of that amount, was entitled to a credit against its income in 1943 of an amount at least equal to the value of the corpus so distributed.

The Tax Court, while recognizing the provisions of Section 162(d)(1) of the Internal Revenue Code, held that it was the intention of Congress in enacting such provisions to have it apply only in those cases in which

a bequest or devise of the residuary estate is to be paid, credited or distributed at intervals. It is the petitioner's contention that such is not the meaning of Section 162(d)(1) of the Internal Revenue Code and that both the Tax Court and the Circuit Court of Appeals erred in this respect, which is a very important point in the interpretation of the Internal Revenue Laws and which has not been decided by this Honorable Court, or by any other Circuit Court of Appeals.

Paragraphs 25, 26 and 27 of the stipulation of facts state as follows:

"(25) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on December 8, 1942, Exhibit J attached hereto, was the sum of \$1,146,000.00." (Tr. p. 28.)

"(26) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on July 7, 1943, Exhibit N attached hereto, was the sum of \$27,500.00." (Tr. p. 29.)

"(27) That the fair market value at the time of distribution of the property, distributed to the legatees of the decedent by the order and decree for partial distribution of the Probate Court, made on August 18, 1943, Exhibit P attached hereto, was the sum of \$3,450.00." (Tr. p. 29.)

Section 162(d)(1) of the Internal Revenue Code provides in part as follows:

"Sec. 162(d).

(d) RULES FOR APPLICATION OF SUBSECTIONS
(b) AND (c)—For the purposes of subsections (b) and (c)—

(1) AMOUNTS DISTRIBUTABLE OUT OF INCOME OR CORPUS—In cases where the amounts paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust."

It is the petitioner's contention that, irrespective of any other factor in this case, in view of the fact that there was distributed to the residuary legatees in 1942 property of a fair market value of \$1,146,000.00 and the distributable income of said estate for said year was \$324,209.38, that the entire distributable income for the year 1942 is deductible by the estate by reason of the foregoing provisions of Section 162(d)(1) of the Internal Revenue Code.

Subsection (d) was added to Section 162 of the Internal Revenue Code by Section 111(e) of the Revenue Act of 1942. It is our contention that the foregoing provisions of subdivision (d) were enacted to cover a situation like the instant case, namely, where an estate has distributable income which, at its discretion, may be distributed or accumulated and it distributes corpus in excess of the amount of its distributable income to the persons who are entitled to such income, that it will be deemed that the entire income was distributed to the legatees entitled thereto, notwithstanding such income was not actually paid.

It is somewhat analogous to a distribution by a corporation of its capital to its stockholders which is deemed a distribution out of earnings or profits to the extent thereof. (Sec. 115(b), Internal Revenue Code.)

In General Counsel's Memorandum 24702, 1945-19-12141 (p. 9) an opinion was given with respect to whether amounts distributed by an estate out of its income during the taxable year in which the residue

becomes payable are taxable to the legatee and deductible by the estate under Section 162(b) of the Internal Revenue Code, as amended by Section 111 of the Revenue Act of 1942, where such income is considered principal to the legatee under State law.

We quote from the last portion of this opinion as follows:

"The general statutory plan with respect to estates has been to tax in some way the whole net income of the estate (*Helvering v. Julia Butterworth, et al.*, 290 U. S. 365, Ct. D. 769, C. B. XIII-1, 151 (1934) (3 U.S.T.C. Sec. 1193)), that is, the income is either taxed to the estate as a separate entity or to the legatee to whom the income is paid. The basic principle underlying Section III of the Revenue Act of 1942 is to impose the tax, with stated limitations, upon the person who enjoys the income (the residuary legatee) and still preserve the nontaxability of pecuniary legatees with respect to estate income used to discharge lump-sum bequests. Thus, under Section 162(b) of the Code, as amended, the amounts distributed to the residuary legatee (including a trust-legatee) during the taxable year in which the residue becomes payable, to the extent the estate has income for such taxable year, would represent income to the residuary legatee.

Senate Report No. 1631, Seventy-seventh Congress, second session (C. B. 1942-2, 504, at page 559), states in part as follows:

'Your Committee bill adds an amendment to Section 162(b) of the Code designed to include in the income of a legatee or beneficiary the in-

come of the estate or trust for its taxable year which, within such taxable year, becomes payable to the legatee or beneficiary, even though it then becomes payable as part of an accumulation of income held until the happening of some event which occurs within the taxable year. Such cases are usually cases where accumulated income of an estate is paid to a residuary legatee upon termination of the estate or where income of a trust is accumulated for distribution upon the beneficiary's reaching a specified age.'

Although it is not expressly stated that the provisions of Section 162(b) of the Code, as amended, should be applied without regard to State law, it is inferred that such was the Congressional intent, for it seems clear that Congress intended to change the rule laid down in the *Durkheimer* case, *supra*, and in similar cases, so that the amount paid to the residuary legatee would be taxable to the legatee to the extent that the estate had income for the taxable year in which the residue became payable, irrespective of the fact that under the law of most States such income would be considered an addition of principal to the residue. (See Section 29.162-2(b) of Regulations 111.)

Accordingly, it is the opinion of this office that amounts distributed by an estate out of its income during the taxable year in which the residue becomes payable are, to the extent the estate had income (other than income in respect of a decedent) for such taxable year, taxable to the legatee and deductible by the estate under Section 162(b) of the Internal Revenue Code, as amended

by Section 111 of the Revenue Act of 1942, regardless of the fact that under State law such income is considered principal to the legatee, except where the distribution is made in satisfaction or payment of a pecuniary legacy. (See *Old Colony Trust Co. et al. v. Commissioner*, 38 B. T. A. 828 (CCH Dec. 10,458), and *Arthur H. Wellman v. Welch*, 99 Fed. (2d) 75 (38-2 U.S.T.C. Sec. 9508), with respect to the exception.) Signed by J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.)"

In *Almira A. Wick v. Commissioner* (Memorandum Decision) Docket No. 109506, entered January 15, 1943; 1 Tax Court Memorandum Decisions 434, the Tax Court held that amounts paid a legatee before final distribution where the executors had discretion whether to distribute income or accumulate the income was a distribution of income within the intentment of Section 162(c) of the Revenue Act of 1938 (now Internal Revenue Code) even though the same was marked as on account distribution and the source of the funds came from an account in which both corpus and income were commingled.

If petitioner's contention as above set forth is not correct, it would be comparatively simple to distribute corpus to the legatees, keep the income in the estate, and thus avoid distributing the income to the legatees, which in many instances may be most desirable. This was the practice before 1942 and the reason we contend that the 1942 amendment was designed to correct this evil. Finally, in connection with this

subject matter we quote in part Section 29.162-2(a) of the Regulations:

"The method of allocating income of the estate or trust for its taxable year in cases to which section 162(d)(1) applies is as follows: The aggregate of all amounts which can be paid, credited, or distributed out of other than income (except under a gift, bequest, devise, or inheritance not to be paid, credited, or to be distributed at intervals) is obtained. The aggregate of such amounts is considered to be paid, credited, or distributed in such cases out of income of the estate or trust for its taxable year if it does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts does exceed the distributable income of the estate or trust for its taxable year, the portion of such amount paid, credited, or to be distributed to a legatee or beneficiary is considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of all distributable income as the amount so paid, credited, or to be distributed to the legatee or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to such legatees or beneficiaries for the taxable year of the estate or trust. The proportion stated in the preceding sentence applies only to legatees or beneficiaries of amounts which can be paid, credited, or distributed out of other than income of the estate or trust and, in computing such proportion, the amount of any gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals is not to be included."

The Tax Court held that Section 162(d) of the Internal Revenue Code did not apply because "the bequest and devise of the residuary estate herein is a bequest and devise 'not to be paid, credited or distributed at intervals'".

While the decedent's will did not provide that bequests and devises were to be paid at intervals, the California Probate Code, in effect, made them payable at intervals because Section 1000 of the Probate Code providing for partial distribution after four months and Section 1010 providing for ratable distribution when the time for filing or presenting claims has expired (six months) are, to all intents and purposes, written into the will.

The Tax Court in discussing Section 162(d) of the Internal Revenue Code quotes from a portion of the report of the Ways and Means Committee of the Seventy-seventh Congress, Second Session. This quotation appears at page 156 of the Transcript of Record and reads as follows:

"As a complement to the amendment of section 22(b)(3) and for purposes of clarity, section 162 of the Code is also amended by adding a new subsection designated as '(d)'. This subsection provides a formula for allocating income of an estate or trust to legatees and beneficiaries in order to make the source of distribution clear and to prevent tax avoidance by distributions claimed to be other than out of income or out of income other than income for the current taxable year. It is immaterial under the rule stated in section 162(d) whether income is used to make the distribution,

whether such distribution may, in the discretion of the fiduciary, be made out of other than income, or whether the terms of the will or trust instrument direct that amounts other than income be used to assure the beneficiary the payment of a specified sum at stated intervals. * * *

The Tax Court also refers to Section 29.162-2 of Regulation 111 which deals with Section 162(d)(1) and which we have quoted above.

We submit that the foregoing quotation from the Ways and Means Committee Report and the Regulations referred to directly supports the petitioner's contention and that the Tax Court erred when it stated:

"From the foregoing it is obvious that amounts paid out of corpus on a bequest and devise as herein involved are not within the purpose and scope of subsection (d)."

And also erred when it stated:

"Since the bequest and devise of the residuary estate herein is a bequest and devise 'not to be paid, credited or distributed at intervals', subsection (d) of section 162 is not applicable."

For the foregoing additional reasons we contend, and respectfully submit, that the estate having distributed corpus in 1942 and 1943 to the extent that it had distributable income, it will be deemed a distribution of income.

CONCLUSION.

In conclusion, the petitioner respectfully submits that the questions presented by this petition are of urgent importance in the administration of Internal Revenue Laws insofar as they relate to the taxing of income of an estate of a decedent, which income is, or may be distributed by the estate to the residuary devisees and legatees during the course of the administration of the estate.

The petitioner further respectfully submits that the Tax Court and the Circuit Court of Appeals for the Ninth Circuit misconstrued the provisions of the Internal Revenue Code relating to this subject matter, namely, Section 162(b), (c) and (d)(1), and that this Honorable Court has never settled these questions; that the settlement of said questions affects practically all estates of decedents that are in the course of administration during any considerable period of time, as well as the devisees and legatees of said estates.

The petitioner further respectfully submits that the Tax Court and the Circuit Court of Appeals for the Ninth Circuit misinterpreted the applicable provisions of the California Probate Code which directly affected the appeal in this matter and that if the Circuit Court of Appeals had correctly interpreted the California Probate Law applicable to the instant case, that it would have reversed the decision of the Tax Court.

That by reason of the foregoing facts the Writ of Certiorari herein prayed for, we respectfully submit, should be granted in order that this Honorable Court

may review the decision of the Circuit Court of Appeals for the Ninth Circuit in this case.

Dated, San Francisco, California,
November 1, 1948.

Respectfully submitted,

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Attorney for Petitioner.

ALBERT A. AXELROD,

Of Counsel.